A

IDRIS HASSAN

v.

LEMBAGA PERTUBUHAN PELADANG PERLIS & ANOR

B

COURT OF APPEAL, PUTRAJAYA
MOHKTAR SIDIN JCA
ZAINUN ALI JCA
HELILIAH MOHD YUSOF JCA
C [CIVIL APPEAL NO: R-02-218-2002]
11 JUNE 2007

ADMINISTRATIVE LAW: *Remedies - Declaratory orders - Dismissal - Whether just and fair - Misconduct - Whether disciplinary proceeding*
D *properly conducted - Whether disciplinary committee took into account extraneous matters which plaintiff had no opportunity to rebut*

The plaintiff, an employee in the services of the first defendant Farmers Organization Authority of Perlis, was dismissed from
E service on 14 November 1997 when the second defendant, a committee established under s. 17(1) of the Farmers Organization Authority Act 1973 ('the disciplinary committee'), found him guilty of five charges of misconduct. It was not in dispute that of the five charges preferred against the plaintiff, none pertained
F specifically to falsification of documents. Subsequently, however, by letter dated 24 February 1998 ('the 24 February letter'), the director general of the first defendant informed the Minister of Agriculture that the plaintiff had on 22 March 1997 also committed the 'offence' of falsification of documents. In the court
G below, in his application to declare the dismissal null and void and of no effect, the plaintiff made an issue of the 24 February letter, arguing that it was reminiscent of the disciplinary committee taking into consideration extraneous materials when dismissing him. The learned trial judge however dismissed the argument, ruling that the
H plaintiff had misconstrued the 24 February letter. The learned judge further opined that the disciplinary proceeding was properly conducted, that the plaintiff had sufficient opportunity to defend the charges and that there was no evidence that the disciplinary committee had taken into account extraneous matters or more
I specifically any charge relating to falsification of documents. The learned judge hence dismissed the claim whereupon the plaintiff appealed.

Held (dismissing the appeal)
Per Heliliah Mohd Yusof JCA delivering the judgment of the court:

(1) There is no cogent reason to differ from the finding made by the learned judge. The question here is whether the plaintiff had established on the balance of probabilities that the exclusion of a matter where he was alleged to have falsified certain document was such that it was also the very matter that must have led the disciplinary committee to mete out the punishment that was imposed. On the facts, our answer thereto is in the negative. (para 18)

(2) Nowhere in the contents of the show cause letter or the dismissal letter herein were there references to extraneous materials other than the charges. That being the case, the facts of the present appeal are distinguishable from the cases submitted by the plaintiff (*Surinder Singh Kanda v Government of the Federation of Malaya, Shamsiah bt. Ahmad Sham v. Public Services Commission, Malaysia & Anor, Raja Abdul Malek Muzaffar Shah v. Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors*) (para 24)

(3) It would be a matter of conjecture to suggest that the matter of falsification of a document had led to the disciplinary committee to render its decision as such. It had to be noted that in a letter dated 15 May 1997, the plaintiff had been informed of the fact of an alleged falsification of document which was related to the debts that he had incurred with Bank Rakyat. The debts, which was one of the subjects of the charges of misconduct stated in the show cause letter, had not been shown to be disputed. On this footing, we are of the similar view held by the trial judge that it would be speculative to determine that the allegation of falsification of documents constituted part of the materials leading the disciplinary committee to its decision. (para 27)

(4) The plaintiff failed to establish on a balance of probabilities that despite the exclusion of the matter to form part of the charges of misconduct it had nevertheless been the matter that swayed the decision of the disciplinary committee. In reality, it was an allegation of unproven bias and not that a fair hearing had not been availed to the plaintiff. (para 27)

A **(5)** The present proceeding did not arise from a judicial review and in so far as it is an appeal it is found that the appeal is without merits. The appeal is therefore dismissed. (para 30)

Bahasa Malaysia *translation of headnotes*

B Plaintif, seorang pekerja dalam perkhidmatan defendan pertama Lembaga Pertubuhan Peladang Perlis, telah dibuang kerja pada 14 November 1997 apabila defendan kedua, iaitu jawatankuasa yang ditubuhkan di bawah s. 17(1) Akta Lembaga Pertubuhan Peladang 1973 ('jawatankuasa disiplin'), mendapatinya bersalah atas lima
C dakwaan salahlaku. Tidak dinafikan bahawa dari kelima-lima pertuduhan yang dihadapkan kepada plaintif, tiada satupun yang khusus menyangkuti pemalsuan dokumen. Apapun, melalui surat bertarikh 24 Februari 1998 ('surat 24 Februari'), ketua pengarah
D defendan pertama telah memberitahu Menteri Pertanian, bahawa plaintif juga pada 22 Mac 1997 telah melakukan 'kesalahan' memalsukan dokumen. Di mahkamah di bawah, dalam permohonan untuk mengisytiharkan pemberhentian kerjanya sebagai tak sah dan batal serta tak berkesan, plaintif telah mengambil isu dengan surat
E 24 Februari dengan berkata bahawa surat tersebut menunjukkan bahawa jawatankuasa disiplin telah mengambilkira faktor-faktor luaran apabila membuang kerjanya. Hujah ini bagaimanapun ditolak oleh yang arif hakim yang berkata bahawa plaintif telah tersalah tafsir surat 24 Februari. Yang arif hakim seterusnya memutuskan
F bahawa prosiding disiplin telah dijalankan dengan sempurnanya, bahawa plaintif telah diberi peluang yang mencukupi untuk membela diri dan bahawa tiada keterangan yang menunjukkan bahawa jawatankuasa disiplin telah menimbang perkara-perkara luaran atau lebih khusus pertuduhan mengenai pemalsuan
G dokumen. Yang arif hakim dengan itu menolak tuntutan dan plaintif merayu.

Diputuskan (menolak rayuan)
Oleh Heliliah Mohd Yusof menyampaikan penghakiman mahkamah:

H **(1)** Tidak terdapat alasan yang kuat untuk menyimpang dari dapatan yang dibuat oleh yang arif hakim. Persoalan di sini adalah sama ada plaintif telah membuktikan atas imbangan kebarangkalian bahawa pengenepian halperkara di mana beliau
I dikatakan telah memalsukan dukumen adalah sebegitu rupa sehingga ia boleh dikatakan bahawa halperkara itulah yang

sebenarnya membawa kepada jawatankuasa disiplin menjatuhkan hukuman ke atasnya. Berdasarkan fakta, jawapan kami kepada soalan ini adalah berbentuk negatif. A

(2) Tiada suatu apapun di dalam surat tunjuk sebab atau surat pembuangan kerja di sini yang menunjukkan bahawa rujukan dibuat kepada perkara-perkara luaran selain dari apa yang ada di dalam pertuduhan-pertuduhan. Atas alasan ini maka fakta rayuan di sini adalah boleh dibezakan dari kes-kes yang dikemukakan oleh plaintif (*Surinder Singh Kanda v. Government of the Federation of Malaya, Shamsiah bt Ahmad Sham v. Public Services Commission, Malaysia & Ors, Raja Abdul Malek Muzaffar Shah v. Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors*). B C

(3) Mengatakan bahawa pemalsuan dokumen adalah perkara yang membawa kepada jawatankuasa disiplin membuat keputusan seperti yang dibuatnya adalah satu tekaan semata-mata. Harus diperhatikan bahawa dalam satu surat bertarikh 15 Mei 1997, plaintif telah diberitahu mengenai perkara pemalsuan dokumen berhubung dengan hutang-hutang beliau dengan Bank Rakyat. Hutang-hutang tersebut adalah merupakan salah satu halperkara yang menjadi asas kepada pertuduhan-pertuduhan salahlaku di dalam surat tunjuk sebab, dan ia nampaknya tidak dipertikai. Atas dasar itu, maka kami mengambil pendirian yang sama seperti yang arif hakim, iaitu bahawa adalah sesuatu yang spekulatif untuk mengatakan bahawa dakwaan pemalsuan dokumen merupakan sebahagian dari material yang membawa jawatankuasa disiplin kepada keputusannya. D E F

(4) Plaintif gagal membuktikan atas imbangan kebarangkalian bahawa walaupun halperkara tidak menjadi sebahagian dari pertuduhan-pertuduhan salahlaku namun ia tetap merupakan halperkara yang mempengaruhi keputusan jawatankuasa disiplin. Pada relitinya, ia adalah satu dakwaan berat sebelah yang tak dibuktikan dan bukannya bahawa suatu pendengaran yang adil telah tidak diberi kepada plaintif. G H

(5) Prosiding semasa tidak berbangkit dari suatu semakan kehakiman dan setakat mana ia merupakan suatu rayuan adalah didapati bahawa rayuan adalah tidak bermerit. Rayuan dengan itu ditolak. I

Case(s) referred to:

Gouriet v. Union of Post Office Workers [1978] AC 435 ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

R v. Entry Clearance Officer Bombay ex p Amin [1983] 2 AC 818 ***(refd)***

Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 CA ***(dist)***

Shamsiah Ahmad Sham v. Public Services Commission Malaysia & Anor [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419 SC ***(dist)***

Surinder Singh Kanda v. Government of the Federation of Malaya [1962] MLJ 169 ***(dist)***

Vasudevan v. Damodaran & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

Farmers Organization Authority Act 1973, s. 17(1)

Rules of the High Court 1980, O. 53

For the appellants - Jagdeep Singh Deo; M/s Karpal Singh & Co

For the 1st & 2nd respondent - Zainur Zakaria (Ramlan Khamis with him); M/s Abdul Aziz Rahim & Co

[Appeal from High Court, Perlis; Civil Suit No: 21-01-1998]

Reported by WA Sharif

JUDGMENT

Heliliah Mohd Yusof JCA:

[1] We have dismissed this appeal and the reasons are as follows.

[2] The plaintiff/appellant appealed against the decision of the learned High Court Judge in dismissing his claim for various relief including, *inter alia*, a declaration that the plaintiff's dismissal from the services of the first defendant/respondent was null and void and of no effect. The plaintiff also sought by way of the declaratory order a reinstatement to his former position in the services of the first defendant being a statutory body (the authority). The second defendant/respondent is a committee established pursuant to s. 17(1) of the Farmers Organization Authority Act 1973 (the disciplinary committee).

[3] The following is the background leading to the appeal. At the material time the plaintiff had been serving as an assistant in economic affairs in the services of the authority. Disciplinary proceedings had been instituted against the plaintiff. As indicated in the judgement of the learned trial judge the plaintiff had by a letter dated 15 May 1997 received a show cause letter (the show cause letter 15 May 1997) in which five charges were detailed with particulars relating to the misconduct of the plaintiff as follows:

a) non-compliance with the procedure of applying for leave,

b) constantly reporting late for working,

c) on numerous occasion leaving office without seeking prior permission from the head of department,

d) having incurred several serious financial debt which were itemised without informing the head of department,

e) having written to the Deputy Secretary General 1, the Ministry of Agriculture directly without the prior approval of the departmental head or alternatively without channelling the letter though the departmental head,

f) these five allegations of misconduct were stated to have constituted breaches of the departmental regulations of the authority.

[4] It is also to be noted that all the five charges of misconduct were framed on the basis of a report dated 28 February 1997 made by a state director of the authority to the director general of the same.

[5] The plaintiff having been found guilty of all five charges was then dismissed by a letter dated 14 November 1997 (dismissal letter 14 November 1997) which was to take effect from 1 December 1997.

[6] It has not been disputed that the plaintiff had not only been given the opportunity to make representations in respect of the charges but also had the opportunity to submit mitigations before the decision of the disciplinary committee was imposed. It was also conceded that the plaintiff was thereafter given another opportunity to appeal against the decision of the disciplinary

committee (*vide* dismissal letter) and which was accordingly made (*vide* letter 30 November 1997) to the authority but nevertheless it was rejected.

[7] The facts and circumstances of this case were also considered by the learned trial judge. But as was also indicated in his decision the principal complaint of the plaintiff was grounded on an alleged breach of natural justice arising out of a letter dated 24 February 1998 (24 February 1998 letter) which was written three months after the dismissal letter 14 November 1997. The 24 February 1998 letter had been addressed to the then Minister of Agriculture by the director general of the authority who was also the chairman of the disciplinary committee. Since a certain paragraph of that letter has become the crux of this appeal it is useful to reproduce the full text of that said letter:

LPP(A)0.691/(80)
24 Februari 1998

Yang Berhormat,
Datuk Amar Dr. Sulaiman bin Hj. Daud,
Menteri Pertanian Malaysia,
Tingkat 4, Wisma Tani,
Jalan Sultan Salahuddin,
50624 Kuala Lumpur

Y.B. Datuk Amar,

Rayuan Encik Idris bin Hassan Terhadap Keputusan Jawatankuasa Tatatertib LPP

Dengan hormatnya saya merujuk kepada surat Y.A.B. Menteri Besar Perlis bil: MB.PS.P.A.031 P Jld. 3 (128) bertarikh 5 Februari 1998 yang dikemukakan kepada Y.B. Datuk Amar berhubung dengan perkara di atas.

2. Untuk makluman Y.B. Datuk Amar, Encik Idris bin Hassan adalah seorang pegawai Lembaga ini yang berkhidmat di Pejabat Lembaga Pertubuhan Peladang Negeri Perlis sebagai Pembantu Ehwal Ekonomi (E7). Beliau telah dikenakan tindakan tatatertib oleh Jawatankuasa Tatatertib LPP kerana melakukan beberapa kesalahan yang melanggar tatakelakuan di bawah Peraturan-peraturan Pegawai Lembaga Petubuhan (Kelakuan dan Tatatertib) 1994.

3. Jawatankuasa Tatatertib LPP yang bersidang pada 31 Oktober 1997 telah mendapati pegawai ini bersalah dan dikenakan hukuman tatatertib buang kerja berkuatkuasa mulai 01 Disember 1997. Beliau telah mengemukakan rayuan secara bertulis kepada Lembaga LPP dalam tempoh empat belas (14) hari sebagaimana yang diperuntukkan dalam Akta LPP. Lembaga LPP yang bersidang pada 30 Disember 1997 telah menimbangkan rayuan pegawai ini dan membuat keputusan menolak rayuan tersebut dan mengekalkan hukuman tatatertib sepertimana yang telah diputuskan oleh Jawatankuasa Tatatertib LPP pada 31 Oktober 1997. Mengikut Seksyen 17(9) Akta LPP 1973 (pindaan 1990) keputusan Lembaga mengenai rayuan itu adalah muktamad.

4. Berikutan daripada keputusan tersebut Y.A.B Dato' Seri Shahidan bin Kassim, Menteri Besar Perlis telah mengemukakan rayuan ke Lembaga ini melalui suratnya MB.PS(Sulit)S/059 sk.14 (29) bertarikh 27 Disember 1997 meminta supaya dipertimbangkan semula hukuman tatatertib yang telah dikenakan ke atas pegawai ini.

5. Atas rayuan Y.A.B Dato' Seri itu, kes pegawai ini telah dibawa sekali lagi ke dalam Mesyuarat Lembaga LPP untuk dipertimbangkan semula. Mesyuarat Lembaga LPP pada 20 Januari 1998 telah menimbangkan rayuan Y.A.B Dato' Seri dan dengan dukacitanya membuat keputusan menolak rayuan itu dan mengekalkan hukuman tatatertib sebagaimana yang telah diputuskan oleh Jawatankuasa Tatatertib LPP dan Lembaga LPP.

6. Untuk makluman Y.B. Datuk Amar, pegawai ini juga telah melakukan kesalahan memalsukan tandatangan Pengarah LPP Negeri Perlis sebagai pengesahan oleh majikan di dalam borang arahan potongan gaji (Borang BPA 1/79-Pind. 85) bertarikh 22.3.97 kepada ANGKASA berkaitan dengan urusan pinjamannya di Bank Kerjasama Rakyat Malaysia Berhad Cawangan Kangar.

7. Menurut rekod perkhidmatan, pegawai ini pernah dikenakan pergerakan gaji tahunan secara statik pada tahun 1997 kerana prestasi kerjanya dalam tahun 1996 sangat tidak memuaskan iaitu kurang daripada 50%.

8. Mengenai para 3 surat Y.A.B Menteri Besar Perlis itu, Lembaga ini akan mengambil tindakan untuk menukarkan pegawai tersebut ke negeri lain sebagai langkah mematuhi arahan dari Kerajaan Negeri Perlis yang disampaikan melalui Pengerusi Jawatankuasa Pertanian Negeri Perlis kepada LPP dalam suratnya bil:AMMK.PS 03A/015(26) bertarikh 22 Disember 1997.

9. Bersama-sama ini juga disertakan sesalinan koronologi kes Encik Idris bin Hassan untuk makluman Y.B Datuk Amar.

Sekian,terima kasih.

Tema Hari Peladang, Penternak dan Nelayan Kebangsaan 1997

"BERSAMA MENINGKATKAN HASIL PERTANIAN SERTA MEMBENDUNG INFLASI"

Saya yang menurut perintah,

(Dato' Haji A.rahim bin Rahmat)
Ketua Pengarah
Lembaga Pertubuhan Peladang.

[8] The contents of the said letter disclosed that the plaintiff had not only made an appeal to the disciplinary committee but had also resorted to seek the assistance of the Menteri Besar Perlis whereby the Menteri Besar had by letter dated 27 December 1997 also sought assistance by making a request to the disciplinary committee to reconsider its decision. Apparently the Menteri Besar had in turn also sought the assistance of the Minister of Agriculture to use his good offices for a further reconsideration by the disciplinary committee. It was in response to this call for further help that the said letter of 24 February 1998 was written by the chairman of the disciplinary committee in his capacity as the director general of the authority.

[9] The contents of para. 6 of the said letter constitute the basis upon which it is alleged that the breach of natural justice has been occasioned. On both instances that is before the learned trial judge and this court the gist of the argument is simply that the disciplinary committee had taken into consideration extraneous matters in respect of which the plaintiff had no opportunity to comment or rebut.

[10] However before addressing this issue it is necessary to dispose of one other related matter. It was stated as one of the grounds of appeal that the learned trial judge had erred in law in not drawing an adverse inference against the defendants for the failure on their part to call for a witness to give evidence to counter the suggestion that extraneous matters had indeed been taken into account as evidenced through the documentary evidence in the form of 24 February 1998 letter. This is indeed a

180 degrees turnaround stance taken by learned counsel for the plaintiff since it was agreed by the parties to dispense with the oral evidence of parties. The plaintiff is therefore estopped from invoking the provisions of s. 114(g) of the Evidence Act 1950 and to invoke that section now is misplaced. It is also unacceptable that since the parties have agreed that the trial court is to determine the case on the basis of the agreed bundle of documents it is therefore also to be understood that the plaintiff's burden of proof in law is dispensed with and the onus by implication shifted to the defendants.

[11] The granting of a declaratory order pertains to an exercise of discretion as has been made clear in *Gouriet v. Union of Post Office Workers* [1978] AC 435 per Lord Diplock at p. 501:

> Authorities about the jurisdiction of the courts to grant declaratory relief are legion. The power to grant a declaration is discretionary. It is a useful power and over the course of the last hundred years it has become more and more extensively used – often *as an alternative to the procedure by way of certiorari in cases where it is claimed that a decision of an administrative authority which purports to affect rights available to the plaintiff in private law is ultra vires and void*. Nothing that I have to say is intended to discourage the exercise of judicial discretion in favour of making declarations of right in cases where the jurisdiction to do so exists.
>
> Italic for emphasis only.

[12] In the exercise of his discretion the learned trial judge had made a specific finding that there was no evidence to be found in the dismissal letter 14 November 1997 (that is the letter in which the disciplinary committee had communicated its finding to the plaintiff that the latter was found guilty of disciplinary misconduct and the decision to dismiss him from the services of the authority) to indicate that the disciplinary committee had taken into account extraneous matter or more particularly any charge relating to the falsification of document. The judge had further reasoned that the plaintiff had misconstrued the contents of the letter of 24 February 1998 addressed to the Minister on the ground that on the part of the plaintiff it was speculative or conjectural.

[13] The contention of the plaintiff was grounded on several judicial pronouncements including those found in *Shamsiah bt. Ahmad Sham v. Public Services Commission Malaysia & Anor* [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419 and *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619. Specific reference is made to these decisions as they also pertain to declaratory orders as the relief being sought. The sum total of the contention that could be discerned is simply that the disciplinary committee took into consideration extraneous matters which the plaintiff has had no opportunity to rebut and such extraneous material must have played a part in influencing the disciplinary committee in arriving at its decision.

[14] In the present appeal the extraneous material which the plaintiff claimed the disciplinary committee must have taken into account is to be gleaned from para. 6 of the letter of 24 February 1998:

> 6. Untuk makluman Y.B. Datuk Amar, pegawai ini juga telah melakukan kesalahan memalsukan tandatangan Pegarah LPP Negeri Perlis sebagai pengesahan oleh majikan di dalam boring arahan potongan gaji (Borang BPA 1/2\79 - Pindaan) bertarikh 22.3.1997 kepada ANGKASA berkaitan dengan urusan pinjamannya di Bank Kerjasama Rakyat Malaysia Berhad Cawangan Kangar.

[15] This paragraph has to be read in the context of the entire letter as reproduced above where an explanation was given to the Minister (*vide* paras 2 and 3) of the entire course of action of the disciplinary committee. It referred however to a forged signature alleged to have been made by the plaintiff and described as "kesalahan" (offence).

[16] It was of course drawn to the attention of this court that the alleged falsification of a document (or alleged forged signature) had transpired on the date 22 March 1997, that is a date before the disciplinary committee made its decision to mete out the disciplinary punishment of dismissal on 31 October 1997.

[17] The learned trial judge in his decision dated 28 May 2002 had stated in the penultimate paragraph:

> Akhir sekali setelah meneliti dokumen-dokumen berkaitan prosiding tindakan tatatertib terhadap plaintiff itu yang dijalankan itu adalah teratur dan pihak plaintiff telah diberi peluang sepenuhnya untuk membuat pembelaan keatas pertuduhan-pertuduhan yang dikenakan terhadapnya sebagaimana yang terkandung dalam suratnya bertarikh 17hb Jun 1997.

[18] There would appear to be no cogent reason to differ from that finding. The question here was whether the plaintiff upon whom the burden of proof lie in making his averments, had established on a balance of probabilities, that the exclusion of a matter where he was alleged to have falsified certain document was such that it was also the very matter that must have led the disciplinary committee to mete out the punishment that was imposed. Our answer is in the negative.

[19] The learned counsel for the plaintiff had referred to *Surinder Singh Kanda v. Government of the Federation of Malaya* [1962] MLJ 169 and in particular the oft cited decision of Lord Denning (which is referred to hereinafter).

[20] However it has to be pointed out that the learned counsel in his submission either through a typing error or inadvertence had omitted an important line from certain relevant passages which were cited. The facts in *Kanda*'s case are as follows:

> The Commissioner of Police first appointed a Board of Inquiry against Kanda. After considering the Board's report, the Commissioner appointed an adjudicating officer to enquire into the charges against Kanda. As a result of the findings of the adjudicating officer, Kanda was dismissed from police service. The adjudicating officer was given a copy of the report of the Board of Inquiry which contained a severe condemnation of Kanda, but Kanda was not given a copy thereof, and he thus had no opportunity of correcting or contradicting the report. The Privy Council held that the proceedings of the adjudicating officer were vitiated and that Kanda had been dismissed without being given a reasonable opportunity of being heard. It was not correct to let the adjudicating officer have a copy of the report without giving a copy of the same to Kanda, and so the order of dismissal was void.

[21] It is found necessary to elaborate further on this case as an interesting part of the Privy Council's pronouncement is that it repudiated the view of the trial judge that the failure to supply a report to Kanda raised a question of bias against Kanda. The trial court had subscribed to the view that it was impossible to say that

A the findings of the board of inquiry must not have inevitably prejudiced the mind of the adjudicating officer against Kanda. The report of the inquiry must therefore have created a "very real likelihood" (of bias) so that he would have a pre-determined bias against Kanda. The Privy Council however pointed out that no
B question of bias arose in such a situation. This matter was discussed in detail at p. 172 of the report. The view of the Privy Council was inter alia as follows:

> The rule against bias is one thing. The right to be heard is
C another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in cause sua: and Audi alteram partem.* They have recently been put in the two words Impartiality and Fairness. *But they are separate concepts and are governed by separate considerations.* In the present case
D Inspector Kanda complained of a breach of the second. ... He had been dismissed without being given a reasonable opportunity of being heard.
>
> Italic for emphasis only.

E **[22]** The line omitted by the learned counsel is the following:

> But they are separate concepts and are governed by separate considerations.

F **[23]** In the present appeal what was being challenged is the question of fairness. The plaintiff had been given notice (the show cause letter) and he had the opportunity to make representations. But his claim here was that the decision of the disciplinary committee ought to be vitiated for that committee must have also relied on the alleged falsification of documents. In other words the
G contents of para. 6 of the letter of 24 February 1994 suggested that the disciplinary committee had taken into account an extraneous material which had not been brought to the attention of the plaintiff such that he may not have had the opportunity to controvert the same.

H **[24]** The contents of documents available before the court disclosed that the several charges of dereliction of responsibility and duty that were particularized in the show cause letter were substantiated in a full report. The plaintiff had been given the
I opportunity to submit his representation. This aspect had not been

disputed in this appeal. The facts of the present appeal are distinguishable from the cases mentioned above in that nowhere in the contents of the show cause letter or dismissal letter were there references to other extraneous material other than the charges. In those cases the disciplinary body had referred to "other information" which were not made clear to the plaintiff concerned. In *Shamsiah*'s case, *supra,* it was her past record of service which had not been referred to her.

[25] What is more pertinent however apart from the allegation of taking into account of an extraneous matter nowhere is it found in evidence that the plaintiff had not been given the opportunity to rebut all the particulars of the charges that were framed in the show cause letter of 15 May 1997.

[26] It is not intended to be mere surplussage of words to refer to the words of the Federal Court in *Vasudevan v. Damodaran & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101 per Abdoolcader J as he then was:

> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review question of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co. v. Johnston* at page 148 per Lord Wright). The Privy Council held in *Ratnam v. Cumarasamy & Anor.* that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v. Bartlam*.

[27] This court is in agreement that in would be a matter of conjecture to suggest that the matter of falsification of a document had led the disciplinary committee to render its decision as such for that matter could well have been a matter of penal action according to criminal law instead of being included as a subject matter of disciplinary proceedings. It has to be noted that in a letter dated 15 May 1997, the plaintiff had been informed of the fact of an alleged falsification of document which were related to

A the debts that he had incurred in Bank Rakyat. The debt was one of the subjects of the charges of misconduct stated in the show cause letter. The debts had not been shown to be disputed. On this footing we are therefore of the similar view held by the learned trial judge that it would be speculative to determine that the B allegation of falsification of documents must have constituted a part of the materials leading the disciplinary committee to its decision. On record the plaintiff had failed to establish on a balance of probabilities that despite the exclusion of the matter to form part of the charges of misconduct it had nevertheless been the C matter that swayed the decision of the disciplinary committee. In reality it was an allegation of unproven bias and not that a fair hearing had not been availed to the plaintiff.

[28] There is another ancillary point. The learned counsel for the D plaintiff had urged upon the court that the five charges actually preferred against the plaintiff could not have been so grave as to warrant such a severe penalty as a dismissal being imposed and therefore the allegation of the falsification of signature must have been the factor to tilt the decision of the disciplinary committee E to impose the punishment of dismissal. This point necessitates a reference to the case cited by the learned counsel for the defendants that is *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405. The learned judge Peh Swee Chin FCJ (as he was then) in delivering the decision of the Federal Court dealt F with the matter at pp. 412-413:

> A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art 135 of the Federal Constitution which provides that no member of such service shall be dismissed G or reduced in rank except: (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. He is, in addition, entitled to protection from sufficient compliance with the rules of natural justice and the disciplinary procedure provided therefore: see *Mohd bin Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan* H *& Anor* [1997] 2 MLJ 361. If the public officer succeeds in so impugning, any order of punishment, including an order of dismissal, can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the I public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.

To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer or employee. After all is said and done, persons in the public service categorized under art 132 of the Federal Constitution are in fact employees.

Then again, there is the elementary principle that court will not normally decree a specific performance of a contract of personal service or its terms thereof. After a court intervenes by judicial review the question of the alleged disciplinary breach, the court should thereafter give due respect to this principle on the question of penalty.

The intervention of the said art 135 and the rules of natural justice, etc in the case of a public officer is only one of two exceptions to this elementary principle. See Mohd bin Ahmad. It must be borne in mind that when a court declares as void an order of dismissal against a public officer categorized under art 132 of the Federal Constitution (see *Mohd bin Ahmad*), it does so because the accusation against him on which such an order of dismissal is based, has been found to be invalidly made or conducted, so that the order of dismissal, and for that matter, any other order of penalty is thereby a non sequitur. The court in truth is not substituting the order of dismissal with its own measure of punishment and if in the latter case, it would amount to the court forcing the employer/government to still employ him, or specifically enforcing a contract of personal service.

It cannot be denied further that the disciplining of a public officer by his department head is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even though the Judiciary is the judicial branch of the government as well as an institution which belongs to the people. To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above.

Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, in a similar vein, an employer, including a government, is the best person to judge similarly the seriousness of misconduct of an employee.

[29] Finally it has also to be pointed out that the plaintiff had sought relief by way of a declaratory order which was different from the nature of a relief sought under O. 53 of the Rules of the High Court 1980 which would include a relief by way of *certiorari* or a *mandamus*. As expressed by Lord Fraser of Tullybelton in *R v. Entry Clearance Officer Bombay exp Amin* [1983] 2 AC 818:

> Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made ... Judicial review is entirely different from an ordinary appeal. It is made effective by the court questioning an administrative decision without substituting its own decision, and it is contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

[30] The present proceeding did not arise from a judicial review and in so far as it is an appeal it is found that the appeal is without merits. The appeal was therefore dismissed with costs. The decision of the High Court is affirmed.